Supreme Court, U.S.
FILED
FEB 24 2016
OFFICE OF THE CLERK

No. 15-474

IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Under the federal bribery statute, Hobbs Act, and honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take "official action" in exchange for money, campaign contributions, or any other thing of value. The question presented is whether "official action" is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.

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INTRODUCTION

Robert F. McDonnell is a former Virginia Governor, retired U.S. Army Lieutenant Colonel, and lifelong public servant who was convicted on federal corruption charges on the theory that he accepted otherwise-lawful gifts and loans in exchange for five supposedly "official acts." Yet those five acts—alleged in the indictment, charged to the jury, and essential to the convictions—were limited to the most routine political activities: arranging meetings, asking questions, and attending events. There is no dispute that Governor McDonnell never exercised any governmental power on behalf of his benefactor, promised to do so, or pressured others to. As the only staffer who met with the alleged bribe-payor during the supposed conspiracy testified: The Governor never "interfere[d]" with her office's "decision-making process." Pet.App.203a. To overcome this failure of proof, the Government persuaded the lower courts to disregard every relevant constitutional principle and stretch the corruption laws beyond recognition. Despite bribery's age-old confinement to the abuse of actual sovereign power, the lower courts held that asking about a policy, arranging a meeting to discuss a policy, or appearing at an event where a policy is mentioned are "official" acts "on" that policy because such acts could, hypothetically, "have the purpose or effect of exerting some influence." Pet.App.54a.

This case marks the first time in our history that a public official has been convicted of corruption despite never agreeing to put a thumb on the scales of any government decision. Officials routinely arrange meetings for donors, take their calls, politely listen to their ideas, and refer them to aides. In

criminalizing those everyday acts, the Government has put every federal, state, and local official nationwide in its prosecutorial crosshairs. That dramatic expansion of multiple major federal crimes repudiates bedrock principles of constitutional law, centuries of legal history, this Court's decisions, the analogous bribery statute for federal officials, and basic common sense. This Court should reject it.

The Court should, indeed, foreclose further abuse of the statutes at issue. Six Terms ago, this Court rescued the honest-services law from invalidation—over three Justices' vigorous disagreement—by judicially confining that vague prohibition to its "bribe-and-kickback core." *Skilling v. United States*, 561 U.S. 358, 409 (2010). The Government has now shown the inadequacy of that judicial constraint. With 93 U.S. Attorney's Offices employing thousands of ambitious prosecutors, prosecutorial discretion in this politically charged arena must be confined by clear, congressionally imposed limits. Anything less is a recipe for further abuse. The Court should thus hold these provisions unconstitutionally vague.

OPINIONS BELOW

The Fourth Circuit's opinion (Pet.App.1a) is at 792 F.3d 478. The district court's opinions denying a new trial (Pet.App.80a) and acquittal (Supp.JA.80) are at 64 F. Supp. 3d 783 and 2014 WL 6772486, respectively.

JURISDICTION

The Fourth Circuit entered judgment on July 10, 2015, and denied rehearing on August 11, 2015. Pet.App.135a. Title 28 U.S.C. § 1254(1) confers jurisdiction.

PROVISIONS INVOLVED

Relevant provisions are at Pet.App.137a.

STATEMENT

The Government's case against Governor McDonnell centers on his interactions with Jonnie R. Williams, Sr., who was CEO of a Virginia-based public company, Star Scientific. Specifically, the Government alleged that Williams provided benefits to the Governor and his family in exchange for five "official" actions. Whether those acts were actually "official" ones is the central issue before this Court.

A. Factual Background of the Charges.

1. Governor McDonnell Meets Williams. Governor McDonnell met Williams in 2009 during a gubernatorial campaign in which he used Williams' plane (among other planes). III.JA.2203, IV.JA.2955. Williams had long loaned the plane to political candidates; as he explained, "it's become common practice here in Virginia ... [to] allow the politicians to use the airplanes because if you're a Virginia company, you want to make sure that you have access to these people." III.JA.2203. Williams' donated flights—all disclosed, IV.JA.2920—made him one of the campaign's largest donors, IX.JA.6055.

Following his election, Governor McDonnell flew to California for a political event on Williams' plane. Williams accompanied him on the flight back. On that flight, Williams talked about Anatabloc, Star's nutritional supplement—a discussion during which the Governor fell asleep, IV.JA.2438—and requested a chance to meet with someone, III.JA.2210-11. Williams testified that Governor McDonnell "didn't agree" to do anything, but said he would put

Williams in touch with the right person. III.JA.2211. Williams subsequently met with Virginia's Secretary of Health in November 2010. The Secretary, whom the Government called to testify, "never got" any "ask" at the meeting; he testified that he must have "missed the punch line." V.JA.3739-40.

2. The Alleged Conspiracy. According to the Government, the "conspiracy" began six months later in April 2011. I.JA.113. That month, Williams sat next to Governor McDonnell at a political event in New York City. Unbeknownst to the Governor—who thought his staff had invited Williams in recognition of the donated flights, IX.JA.6055—Mrs. McDonnell had invited Williams, in conjunction with him taking her shopping. III.JA.2222. (Williams never mentioned his purchases to the Governor during the supposed "conspiracy." IV.JA.2646-47.)

Williams claimed that, in the weeks following, *Mrs.* McDonnell requested a $50,000 personal loan and $15,000 to fund the catering at her daughter's upcoming wedding. III.JA.2231. Williams testified that, when requesting this help, Mrs. McDonnell offered to provide *her* assistance in return; she purportedly said she had "a background in nutritional supplements" and could be "helpful" in promoting Star's product to consumers. III.JA.2231. But the prosecutor eliciting this testimony clarified that she was not promising the *Governor's* assistance:

> Q: Well, to be clear, she's saying that she's going to help you, but she's not promising you that the Governor is going to help you, right?
>
> A: No.

> Q: And she never tells you at this meeting, "I'll get Bob to do X, Y or Z if you give us the money"?
>
> A: No.

III.JA.2231-32.

That distinction was reflected in subsequent events, at which Mrs. McDonnell (who was allowed outside employment) helped Williams promote his products—*e.g.*, by traveling to Star events and telling attendees how much she liked Anatabloc, IV.JA.2297-2300—while Governor McDonnell did nothing to help Williams accomplish anything.

3. The First "Official Act": Arranging a Meeting. The first supposedly "official act" that formed the heart of the prosecution occurred in July 2011, following a drive home from Williams' vacation property, which the McDonnells had used for a weekend (as properly disclosed, CA4.Supp.App.133). Governor McDonnell asked his Secretary of Health to send an aide to a meeting between Mrs. McDonnell and Williams about clinical trials at the University of Virginia ("UVA") and Virginia Commonwealth University ("VCU"). CA4.Supp.App.80.

The Government called that aide as a witness; she testified that Williams made no "ask" in the meeting, V.JA.3075, and that she sent Williams a polite "blow-off" email afterward, Pet.App.201a. Governor McDonnell never pressured the aide to make a governmental decision in Williams' favor. To the contrary, the aide testified that the Governor wanted "nothing more" than her "attending the meeting," V.JA.3044, and never "interfere[d] with [her office's] decision-making process." V.JA.3071.

4. The Second "Official Act": Attending a Luncheon. The next month, August 2011, Governor McDonnell attended a private lunch at the Executive Mansion (his home). Mrs. McDonnell had arranged the lunch, V.JA.3535-36; Governor McDonnell's briefing book described it generically as a "Lunch with Virginia researchers," VI.JA.4121; and one of the Government's primary witnesses testified that "leading up to this event ... Governor McDonnell was not aware that the event was happening," V.JA.3649. Governor McDonnell's PAC funded the event, since it was "not a government function." V.JA.3650.

At the lunch, Star presented $200,000 in grants to UVA and VCU to prepare research proposals. As Governor McDonnell's counsel (also a Government witness) testified, the Governor arrived late and "made his usual greetings." V.JA.3171. A researcher (another Government witness) testified that the Governor later asked some neutral questions: an "interrogative type of a sort of questioning rather than 'Isn't this great?'" V.JA.3344-46. Williams, for his part, asked if the Governor would support state funding for research. But Star's President (likewise a Government witness) testified that the Governor "politely" declined, citing his "limited decision-making power in this area." VI.JA.3927

5. The Third "Official Act": Sending an Email. The supposed "conspiracy" lay dormant from August 2011 until January 2012, when Williams complained to Mrs. McDonnell that the universities were not returning Star's calls despite its having given them $200,000 to prepare research proposals. IV.JA.2308-09. Mrs. McDonnell relayed that complaint to the Governor, who took the third action

underlying this prosecution. He sent his counsel this eleven-word email: "Pls see me about Anatabloc issues at VCU and UVA. Thx." CA4.Supp.App.158.

The counsel never went to "see" Governor McDonnell after that email. As the counsel explained when the Government called him to testify, he took it upon himself to phone Williams' lobbyist and explain "this was something that really needed to be worked out between the company and the universities"; the Governor would *not* get "involved." V.JA.3218-19. That was the end of the matter. The counsel testified that Governor McDonnell "never followed back up with me or never pushed back or never directed me to actually go forward and try to make something happen with the universities." V.JA.3219.

6. The Fourth "Official Act": Allowing Williams To Attend a Party. The next month, Governor McDonnell took his fourth supposedly official act. Consistent with the Virginia First Lady's customary practice of adding guests to events in her home, VI.JA.4494 (former mansion director), Mrs. McDonnell invited Williams and some others he recommended to a "Healthcare Leaders" reception at the Executive Mansion, V.JA.3620. And consistent with the Governor's custom of welcoming prominent out-of-towners, Governor McDonnell introduced one of Williams' associates, Dr. Paul Ladenson, the Head of Endocrinology at Johns Hopkins. In his introduction, the Governor made no mention of Williams, Star, or research. V.JA.3671 72. And of the many witnesses the Government summoned to testify about this mundane reception, none said that Governor McDonnell mentioned Williams, Star, or research to anyone at any point.

7. The Fifth and Final "Official Act": Suggesting a Meeting. Governor McDonnell took his final allegedly "official" act the next month. During a meeting about Virginia's state-employee health plan, VI.JA.4206, Governor McDonnell—who personally used Anatabloc multiple times daily, IX.JA.6331—consumed one of the pills and noted that it had been working well for him. The career staffer at the meeting (whom the Government called as a witness) explained that Governor McDonnell's comment was akin to saying: "I like Advil gel caps over Aleve." VI.JA.4218. She testified "there was no ask" from the Governor, whose comments were "personal." *Id.* The other aide who testified thought Governor McDonnell was suggesting that they meet with Star, but they quickly decided a meeting would not be worthwhile. VI.JA.4227-28. Virginia does not "cover dietary supplements in the state health plan," VI.JA 4204, so there was nothing to meet about. Governor McDonnell never followed-up. VI.JA.4231.

In this same period, Williams provided Governor McDonnell with a $50,000 loan for operating costs at two rental properties he partially owned. Governor McDonnell recorded the terms of that loan on a hand-written document, which he saved and later produced to the Government. IX.JA.6249. Williams later loaned Governor McDonnell another $20,000 on the same terms. IX.JA.6249-53.

8. The Alleged Conspiracy Continues Yet There Are No Further "Official Acts." Despite Governor McDonnell's cessation of supposed official actions in March 2012—and the Government's concession that "[t]here is no express agreement in this case," IX.JA.7614—the Government claimed the

"conspiracy" lasted another year, until March 2013. I.JA.113. Over that period, Williams continued to be generous. He took the McDonnells on a weekend trip to Massachusetts in August 2012 (properly disclosed, IX.JA.6351-52), and in December, gave one of the McDonnells' daughters an expensive wedding gift, X.JA.7054. During this entire period, Governor McDonnell took no actions to assist Williams and promised no future assistance.

B. The Criminal Investigation, Indictment, and Trial.

1. Williams' Immunity Deal. The federal investigation into these interactions began with the FBI interviewing Williams about both his relationship with the McDonnells and numerous financial misdeeds having nothing to do with them. In that interview, Williams was emphatic that he was an admirer of Governor McDonnell who "didn't ask for anything" and "didn't expect anything." IV.JA.2382. But the Government had amassed substantial evidence that Williams had committed multi-million-dollar securities and tax frauds, IV.JA.2612-18, and it used that independent criminal conduct to force Williams to help build a case against Governor McDonnell.

That pressure was effective, but came at a price. The Government secured a version of Williams' testimony that abandoned prior denials of corruption only by granting him wide-ranging "transactional immunity" (*i.e.*, against any subsequent prosecution) rather than the more-common "use immunity" (*i.e.*, against use of specific immunized testimony). The Government, moreover, immunized Williams not only

from (1) potential corruption charges—but also from criminal liability for "(2) conduct related to loans Williams received from 2009 to 2012 in exchange for his pledge of Star Scientific stock; and (3) conduct related to Williams' gifts of Star Scientific stock to certain trusts from 2009 to 2012." XI.JA.7918. The Government thus immunized Williams on multiple unrelated felonies in exchange for his testimony.

2. The Indictment. The Government indicted Governor and Mrs. McDonnell on January 21, 2014. Though it conceded that Virginia law allowed acceptance of unlimited gifts and loans, and that neither Williams nor Star received "a dime of state money," Pet.App.175a, the Government charged the McDonnells with a variety of corruption offenses and conspiracy to commit the same, among other charges.

The Government's basic allegation was that Governor McDonnell's acceptance of otherwise-lawful benefits from Williams was criminal because those benefits were part of a *quid pro quo* for the five "official" actions above. The indictment described those acts—namely, "arranging meetings," "attending events," "allowing" Williams "to invite individuals important to [Star's] business to exclusive events," and "recommending" that officials "meet" with Star executives—as the provision of "favorable official action." Supp.JA.47-48. The indictment alleged no other "official" acts.

3. The Parties' Dueling Legal Theories at Trial. At the ensuing five-week jury trial, both sides presented evidence in accord with their different understandings of federal corruption law.

Williams did not testify to a corrupt agreement. Rather, he would say only that he had a vague belief the Governor would provide unspecified "help" at some indeterminate time. III.JA.2234 ("I needed his help."); IV.JA.2294 ("I thought I had an understanding she was helping me, they were helping me with my company .... "). Williams' testimony made clear that he expected nothing beyond courtesies like the five acts detailed above. As Williams put it: "I expected what had already happened, that he would continue to help me move this product forward in Virginia." IV.JA.2355. When prosecutors pressed Williams about "how" he "expected" Governor McDonnell to "help," Williams testified vaguely: "Whether it was assisting with the universities, with the testing, or help with government employees, or publicly supporting the product." *Id.* Even when the prosecutor became angry, pounding on the podium and demanding a straight answer, Williams could testify only to vague hopes the Governor would "help me." IV.JA.2321-22.

The Government's case therefore hinged—as the district court later explained—on the "five specific actions taken by McDonnell" and their temporal proximity to benefits that Williams conferred. Pet.App.87a. The Government did not seek to prove, because it could not prove, that Governor McDonnell agreed to deploy *official powers* to assist Williams, through these five acts or otherwise.

Instead, the Government sought to establish that the five acts were things governors "customarily" do to "promote the matter and cause of economic development of Virginia businesses." Supp.JA.8 (indictment). It argued that Governor McDonnell's

five acts were "official" because each constituted action "on" the "matter" of "Virginia business development." I.JA.411. Business development was important, the Government said, because Governor McDonnell's campaign slogan had been "Bob's for Jobs." IV.JA.2858 ("Q: During the 2009 campaign for Governor, did the campaign have a bumper sticker-type motto? A: Yes. Bob's For Jobs."); V.JA.3783. Governor McDonnell's commitment to promoting home-state business was thus a centerpiece of the prosecution. VII.JA.5161 ("[H]ow many witnesses, Your Honor, have we heard get up here and say, 'Virginia business and economic development, Bob's For Jobs'?"); Supp.JA.8 (indictment) ("MCDONNELL made it clear that one of his highest priorities as Governor would be acting to promote the matter and cause of economic development for businesses and industries in Virginia, *e.g.* his campaign slogan was 'Bob's for Jobs.'").

For his part, Governor McDonnell established that none of his five acts were "official" because in none did he take—or pressure others to take—any specific action on any governmental matter. The undisputed evidence showed that all five acts were indistinguishable from the dozens of innocuous things governors do daily. *See, e.g.*, VI.JA.4093 ("we probably had more events at the Mansion than any other administration"); VIII.JA.5241 (Governor "would do a ton of events, ribbon cuttings, tour plant facility openings"); VIII.JA.5268 (meeting referrals "numbered in the thousands"); VIII.JA.5269 (whenever anyone "would ask[] for an event or for a meeting, he would say, 'Yes. Call my office.'"); X.JA.9644-45 (hundreds of photographs of Governor

McDonnell at "economic development" events "standing at or near a sign or logo of a company").

4. The Jury Instructions. On the critical issue of the scope of "official action," the district court repeatedly rejected Governor McDonnell's requests for clarifying instructions. Specifically, the court rebuffed requests to convey the bedrock distinction between exercising government power and providing access to officials—refusing to explain that (i) "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts'"; (ii) "you must decide ... whether that conduct was intended to or did in fact influence a specific official decision the government actually makes"; and (iii) "mere ingratiation and access are not corruption." Pet.App.146a-147a. The district court even rejected the modest fall-back Governor McDonnell offered at the charging conference:

> To find an official act, the questions you must decide are both whether the charged conduct constitutes a settled practice and whether that conduct was intended to or did, in fact, influence a specific official decision the government actually makes.

Pet.App.254a.

Instead, the court adopted the Government's proposal verbatim. It quoted the definition of "official act" from the statute governing *federal* officials—"decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity," 18 U.S.C. § 201(a)(3)—and elaborated:

> Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

Pet.App.275a.

The Government capitalized on this expansive language in closings, telling the jury that "official acts" need not have *any* connection to governmental power. All that mattered, the prosecutors argued, was that the five acts concerned "the issue of Virginia business development, which everyone who testified about it said was a capital priority of Bob McDonnell's administration." XI.JA.7438-39. The prosecutors ridiculed the notion that official action requires pressuring anyone to make governmental decisions: "They keep on talking about no one was pressured. When you get these jury instructions, ladies and gentlemen, you look for the word pressure. It doesn't appear anywhere." Pet.App.268a. They

continued: "[O]fficial action ... includes those actions that have been clearly established by settled practice as part of a public official's position." Pet.App.265a. Thus, if Governor McDonnell so much as posed for "photos" or "ma[de] comments at ... ribbon cuttings" in exchange for benefits, "it's a crime." Pet.App.264a. Even the Governor's presence constituted official action, since he did not "have to say a single thing" for state employees to get the "message." XI.JA.7414.

In short, it sufficed that Governor McDonnell's "involvement with every single one of these things was in his official capacity as Governor." XI.JA.7439. True, he never "put a line item in the budget for the studies that Mr. Williams wanted," but that is "like saying a guy who steals a TV isn't guilty because he didn't steal two." *Id.* The Government thus summed up its case by declaring: "Whatever it was, it's all official action." Pet.App.263a.

Unsurprisingly, given this unbounded explanation of federal law, the jury convicted the Governor on the corruption counts, acquitting him of all other charges. Because the jury was not told to identify, or reach unanimity on, which acts were "official," it could have convicted based on any of the five. As the Government told the jury, "any one of those [acts] is sufficient." Pet.App.268a.

C. The Opinions Below.

1. District Court Decisions. The district court denied motions for acquittal or a new trial. The court agreed that the verdict's validity "hinges on the interpretation of an 'official act' and whether McDonnell's actions constitute such." Pet.App.84a. But to distinguish "official" acts (criminal if part of a

quid pro quo) from acts that are not "official" (not criminal *even if* part of a *quid pro quo*), the court circularly ruled that it "look[s] to whether a quid pro quo agreement existed." Pet.App.85a. The district court then held that Governor McDonnell's five acts were all "official" ones. The court also recognized there was no direct evidence of a corrupt agreement, but concluded that the jury could *infer* one based on "the timing of Williams' gifts" vis-à-vis Governor McDonnell's "five specific actions"—all things he "customarily" did. Pet.App.87a-91a.

The Government requested a sentence of 121 151 months in prison. The district court rejected that proposal as "ridiculous," XI.JA.7892, imposing a two-year term instead, Pet.App.123a.

2. The Fourth Circuit Decision. A Fourth Circuit panel affirmed. It held that Governor McDonnell's acts—"asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue"—were all "official acts" allowing for conviction. Pet.App.73a. According to the court, each was an "action" "on" the "question" whether state universities or agencies should conduct or fund studies of Star's product, because that was a topic of the meetings and questions. Pet.App.73a-74a. It did not matter that Governor McDonnell never requested that studies be done. It sufficed that he took steps to gather information through meetings, inquiries, and questions to researchers. *Id.* On the court's unprecedented theory, those prefatory, information-gathering acts *themselves* "exploited" state power "to influence the work of state university researchers." Pet.App.73a.

Notably, while the court found sufficient four of the five alleged official acts, it ignored the fifth—Governor McDonnell allowing Williams and some associates to attend a reception for "Healthcare Leaders." Because that act lacked any attenuated nexus to any governmental matter, the court evidently agreed it could not support conviction.

The court nonetheless upheld the instructions defining "official action"—even though they allowed the jury to convict based on any one of the five acts, including the Healthcare Leaders reception. The jury was never told it had to find any effort to "exercise the actual regulatory power of the state," or "influence" governmental decisions, despite the defense repeatedly seeking such instructions. Pet.App.146a-147a, 251a-254a. In the court's view, "the district court adequately delineated those limits" by quoting the complex statutory definition of "official act" for federal officials (Pet.App.49a), even though the district court further instructed the jury that this definition "includes" acts an official "customarily performs," acts taken "in furtherance of longer-term goals," and any action that is "one in a series of steps to ... achieve an end." Pet.App.91a, 93a.

D. Proceedings in this Court.

This Court granted Governor McDonnell's request for a stay of the Fourth Circuit's mandate so he could remain free pending review. Order, *McDonnell v. United States*, Aug. 31, 2015 (No. 15A218). The Court then granted certiorari on the meaning of "official action," the adequacy of the evidence and jury instructions on that issue, and the constitutional validity of the statutes of conviction.

SUMMARY OF ARGUMENT

In attempting to give some content to the vague honest-services statute and Hobbs Act, this Court has construed them to prohibit the "core" corruption offense of trading "official acts" for things of value. This case asks whether these corruption statutes are limited to abuses of actual governmental power, and whether Congress has spoken clearly enough to comply with the Constitution.

I. Few criminal statutes are as constitutionally problematic as the honest-services provision and the Hobbs Act. They provide scant guidance on the line between permissible politics and federal felonies—depriving officials of fair notice, while empowering prosecutors with vast discretion. In addition to those due-process concerns, these statutes jeopardize the federal-state balance by superseding state ethics codes with national rules of good government. And, atop all that, these laws threaten First Amendment rights by transforming every campaign donor into a potential felon. This is a constitutional minefield—making a narrow construction the only prudent course for federal courts to follow.

II. Particularly seen through this constitutional lens, all relevant sources show that the corruption laws protect the public's right to "honest services" by criminalizing only the abuse of actual governmental decisionmaking, not the provision of mere "access" or conferral of amorphous reputational benefits. The "official acts" these statutes prohibit trading are limited to acts that exercise (or pressure others to exercise) the actual power of the state, *i.e.*, acts that direct or urge a specific decision or commitment on

behalf of the sovereign. The unbroken history of bribery law, the statutory definition of "official action" for federal officials, and this Court's decisions all confirm that agreeing to exercise governmental power—a legislator's vote, a budget appropriation, an executive's order, or an agency's contract award—has always and everywhere been the *sine qua non* of bribery. Petitioner is not aware of any decision in American history endorsing a bribery conviction without an official agreeing to put a thumb on the scales of a specific governmental decision.

The Government asks this Court to abandon that centuries-old confinement of criminal bribery to abuses of actual governmental power, eliminating the distinction between selling a vote to the highest bidder versus referring a donor to an aide for a ten-minute meeting. It seeks to arrogate to federal prosecutors an extraordinary supervisory authority over our democracy. That would make every elected official and campaign contributor a target for investigation and indictment, which is why a broad, diverse, and bipartisan coalition of *amici* from every sector of society affected by the Government's unprecedented rule has urged every court in this proceeding to reject that rule.

III. Because acts are "official" only if they make commitments on the government's behalf or pressure others to, it is clear Governor McDonnell's convictions cannot survive. From day one, the Government's case "hinge[d] on the interpretation of an 'official act' and whether McDonnell's actions constitute such." Pet.App.84a. Under the proper definition of "official action"—acts that direct a particular exercise of sovereign power—the conduct here cannot qualify.

At most, Governor McDonnell provided Williams with access to other officials so Williams could plead his case; the undisputed evidence shows that Governor McDonnell never pressured any official to make any governmental decision to benefit Williams—which is why no such decisions were ever made. Governor McDonnell's convictions must therefore be vacated and the charges dismissed.

At a minimum, though, the jury was erroneously instructed on the line between lawful and unlawful conduct. Rather than explain both the scope and limits of "official action," the district court simply quoted the statutory definition from the statute for federal officials, then offered a lengthy, error-filled disquisition on what that definition "includes." Nowhere did the court even *suggest* that "official action" requires a connection to official power or governmental decisions. Nor did it impose any other limits on its sweeping definition. Instead, it told the jury that every "customary" action counts—staggering overbreadth the prosecutors aggressively and effectively exploited to obtain conviction. For that reason, too, reversal is required.

IV. Finally, this prosecution demonstrates the limited capacity of courts to cabin vague criminal statutes. Criminal law demands clarity. In *Skilling*, this Court did everything it could to save the honest-services statute. But the Government's rapid and thus-far-successful seizure of the same broad powers it possessed prior to that decision shows why due process requires *Congress* to *enact* definite legislation in the first instance. Congress cannot delegate that legislative function by enacting statutory platitudes that leave the lawmaking for criminal litigation

wherein officials go to prison when they guess wrongly about what the courts will hold. This Court should thus, at long last, invalidate the notoriously vague honest-services statute, or, at the least, hold these provisions unconstitutionally vague as applied to Governor McDonnell's conduct.

ARGUMENT

The two federal statutes under which Governor McDonnell was convicted—the honest-services fraud provision and Hobbs Act—do not mention bribery, much less define its elements. *See* 18 U.S.C. § 1346 ("scheme or artifice to defraud" includes "scheme or artifice to deprive another of the intangible right of honest services"); *id.* § 1951(b)(2) ("extortion" is "the obtaining of property from another ... under color of official right"). In an effort to give some content to these provisions, this Court has read them to prohibit "core" bribery—meaning the exchange of "official acts" for payments. *Skilling*, 561 U.S. at 409; *Evans v. United States*, 504 U.S. 255, 268 (1992). This case presents the questions of what constitutes an "official act" under these statutes and whether they are constitutional.

I. CONSTITUTIONAL PRINCIPLES DEMAND THAT THE OPEN-ENDED FEDERAL CORRUPTION LAWS BE CONSTRUED NARROWLY.

This case requires statutory construction, but that exercise must be undertaken in the shadow of the Constitution. As this Court has made clear, most recently in *Skilling*, the vague corruption laws implicate a host of constitutional principles. Each of those general principles militates in favor of a narrow, cautious reading of these criminal statutes.

Due process demands clarity and fair notice before imprisoning public officials for supposed wrongs, yet these statutes could hardly be more opaque. Federalism demands respect for the authority of states to govern their officials, yet the federal corruption laws threaten to impose nationally whatever ethical standards federal prosecutors believe should prevail. And the First Amendment protects the right to contribute to political campaigns—including the increased access to government officials such contributions may yield—yet the corruption statutes risk exposing officials and contributors to criminal investigation, prosecution, and imprisonment.

"[C]onstitutional principles can provide helpful guidance in this statutory context," *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009); indeed, they provide the basic interpretive framework. Each of these principles forcefully and independently counsels toward interpreting these extraordinarily powerful criminal statutes narrowly.

1. The Due Process Clause requires criminal statutes to supply "sufficient definiteness" so that "ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402; *Johnson v. United States*, 135 S. Ct. 2551, 2578 (2015). As a corollary to that rule, "an ambiguous criminal statute is to be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *see also Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). This rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). And it reduces the

risk that prosecutors will abuse vague statutes by enforcing them in an "arbitrary and discriminatory" way. *Skilling*, 561 U.S. at 412.

This Court has repeatedly invoked these due-process principles when construing the vague corruption laws. In *McNally v. United States*, the Court invalidated the original "honest services" theory of fraud, explaining that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." 483 U.S. 350, 359-60 (1987). In *Skilling*, confronted with Congress's one-sentence effort to reinstate that theory, this Court acknowledged the "force" of the "vagueness challenge," 561 U.S. at 405, while three Justices would have invalidated the law, *id.* at 415 (Scalia, Kennedy, & Thomas, JJ.).

These principles guide the analysis here. Neither the Hobbs Act nor the honest-services statute *mentions* bribery—much less defines "official action." Considerations of lenity, fair notice, and arbitrary enforcement require reading the statute narrowly, lest officials be imprisoned for acts nobody understood to be unlawful. Any expansion beyond "core" bribery, *Skilling*, 561 U.S. at 408-09, must come through "clear and definite language" from Congress, *McNally*, 483 U.S. at 360—not aggressive prosecutorial deployment of vague statutes.

2. Basic principles of federalism point in the same direction. This Court recently reaffirmed "the well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual

constitutional balance of federal and state powers.'" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014). Courts should "not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* This concern has led the Court to reject broad interpretations of the Travel Act, *Rewis v. United States*, 401 U.S. 808, 812 (1971); the mail fraud statute, *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); and the Hobbs Act itself, *United States v. Enmons*, 410 U.S. 396, 411 12 (1973).

Most saliently, this Court applied that principle in *McNally*, refusing to construe the fraud statutes "in a manner that ... involves the Federal Government in setting standards of disclosure and good government for local and state officials." 483 U.S. at 360. "If Congress desires to go further," then "it must speak more clearly than it has." *Id.*

The federal corruption laws can intrude deeply into states' authority to regulate their officials, displacing state ethics codes and disrupting the vertical balance of powers. That is especially problematic here, given the vagueness of these statutes: It is bad enough for *Congress* to impose a national code of ethics, but it is far worse for *federal prosecutors* to promulgate one through a series of *ad hoc*, case-by-case convictions. Federalism principles thus require giving these statutes a narrow reading.

3. Finally, the federal corruption statutes implicate First Amendment rights. This Court's decisions, upon which the citizenry reasonably relies, establish that the government "may not target ... the political access" that financial support for candidates

"may afford." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). Only payments "to control the exercise of an officeholder's official duties" may be criminalized. *Id.* at 1450. That is because "[i]ngratiation and access ... are not corruption." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

A broad reading of the corruption laws would tread upon the constitutional principles elucidated in these decisions. Campaign contributions can serve as forbidden *quid*, just like personal gifts. *Evans*, 504 U.S. at 257-58. If bribery encompassed routine courtesies, prosecutors could easily charge any official (or benefactor) with a federal crime, enabling them to potentially imprison people for speech this Court has held is constitutionally protected. *See also infra*, Part II.C. Citizens cannot fully exercise their First Amendment rights to support candidates and petition officials—and officials will be reticent to meet with constituents who have exercised that constitutional right—if all are under perpetual threat of indictment. This tension should be minimized by, again, reading these statutes narrowly.

* * *

In construing the corruption laws, and the "official acts" they regulate, these constitutional norms provide the framework. Expansive statutes confer flexibility, but flexibility in policing political interactions of state officials comes at considerable constitutional cost—a lack of clarity over what conduct is criminal; a real risk of prosecutorial selectivity in an area where the dangers of abuse are at their peak; federal interference with legitimate state decisions over how to regulate political ethics;

and a serious tension with free speech. Absent clear direction from Congress, courts should steer carefully through that constitutional minefield.

For these reasons, this Court has unanimously recognized that the federal corruption statutes—one patch in the larger quilt of legal and ethical regulations—should be given "a narrow. rather than a sweeping," interpretation. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 409 (1999). "[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 412. That overriding principle—deeply rooted in the Constitution and reflected in cases from *McNally* to *Sun-Diamond* to *Skilling*—guides the analysis here.

II. "OFFICIAL ACTION" REQUIRES EXERCISING OR PRESSURING OTHERS TO EXERCISE ACTUAL SOVEREIGN POWER.

This case turns on the scope of "official action." Under current law, the honest-services provision and Hobbs Act both criminalize bribery: the exchange of "official acts" for personal benefits. *See Skilling*, 561 U.S. at 408; *Evans*, 504 U.S. at 268. This Court's most recent explication of these statutes confined the honest-services statute to its "bribe-and-kickback core"—a "core" that "draws content" from (i) "the pre-*McNally* case law" sketching the honest-services theory, and (ii) "federal statutes proscribing—and defining—similar crimes," like 18 U.S.C. § 201(b), the bribery statute governing federal officials. *Skilling*, 561 U.S. at 409, 412. Those same authorities presumptively also control the scope of *quid pro quo* bribery under the Hobbs Act.

These sources confirm that "core" bribery requires agreeing to exercise sovereign power or to induce others to do the same—*i.e.*, attempting to direct a particular resolution of a real governmental decision like what laws to enact, what contractors to hire, or how to appropriate state funds. All bribery convictions from the founding to today involved that basic prerequisite. That requirement is clear from the text and history of the prohibitions against bribing federal officials, which have always been limited to attempts to control concrete governmental decisions. And it is confirmed by the serious practical consequences of endorsing the Government's seizure of plenary power to police ethics in politics.

A. History and Pre-*McNally* Precedent Support This Conclusion.

Skilling held that § 1346 criminalizes "core" misconduct and "draws content" from "pre-*McNally* case law" articulating the honest-services theory. 561 U.S. at 409, 412. That caselaw is consistent with the understanding of bribery that has prevailed since the founding. The common denominator of every bribery conviction is an official's agreement to corrupt the government's decisional process to achieve a specific governmental outcome. Whether it is a customs official who waives import taxes, a judge who fixes cases, or a legislator who sells his vote, abuse of governmental power has always been the basic *sine qua non* of bribery.

1. As *Skilling* observed, when courts began to develop the honest-services theory, they treated bribery as one subset. 561 U.S. at 400-01. Those cases—compiled by the Government in *Skilling*, *see*

Resp't's Merit Br., No. 08-1394, at 42 n.4 (U.S. Jan. 26, 2010)—uniformly involved agreements to put a thumb on the scales of a specific governmental decision. Indeed, the public-official bribery cases the Government cited all involved the following classic categories of *quo*:

- **Steering public contracts.** *United States v. Barrett*, 505 F.2d 1091, 1093-97 (7th Cir. 1974); *United States v. Rauhoff*, 525 F.2d 1170, 1171 72 (7th Cir. 1975); *United States v. Washington*, 688 F.2d 953, 955 (5th Cir. 1982); *United States v. Primrose*, 718 F.2d 1484, 1491 (10th Cir. 1983); *United States v. Whitt*, 718 F.2d 1494, 1495 (10th Cir. 1983); *United States v. Gann*, 718 F.2d 1502, 1503 (10th Cir. 1983); *United States v. Lovett*, 811 F.2d 979, 982 & n.6 (7th Cir. 1987).
- **Voting for, signing, or urging passage of legislation.** *Shushan v. United States*, 117 F.2d 110, 114-15 (5th Cir. 1941); *United States v. Isaacs*, 493 F.2d 1124, 1132-33 (7th Cir. 1974); *United States v. Craig*, 573 F.2d 455, 482 (7th Cir. 1977); *United States v. Mandel*, 591 F.2d 1347, 1356, 1367 (4th Cir. 1979).
- **Resolving criminal or civil cases.** *United States v. Pecora*, 693 F.2d 421, 423 (5th Cir. 1982); *United States v. Murphy*, 768 F.2d 1518, 1524-25 (7th Cir. 1985); *United States v. Qaoud*, 777 F.2d 1105, 1107-08 (6th Cir. 1985); *United States v. Bruno*, 809 F.2d 1097, 1099 (5th Cir. 1987).

- **Rendering administrative (tax or zoning) decisions.** *United States v. Staszcuk*, 502 F.2d 875, 877 (7th Cir. 1974); *United States v. Gorny*, 732 F.2d 597, 599-600 (7th Cir. 1984); *United States v. Alexander*, 741 F.2d 962, 963-64 (7th Cir. 1984).

Petitioner has not found a single pre-*McNally* bribery case that strays from this pattern.

Early common-law authorities are also in accord. The early federal and state bribery decisions invariably involved quintessential exercises of sovereign authority: *e.g.*, awarding a contract, *United States v. Worrall*, 28 F. Cas. 774 (C.C.D. Pa. 1798), *United States v. Green*, 136 F 618 (N.D.NY. 1905); issuing judgments, *United States v. More*, 7 U.S. 159 (1805); agreeing not to prosecute, *State v. Henning*, 33 Ind. 189 (1870), *Diggs v. State*, 49 Ala. 311 (1873); and voting on a legislative matter, *State v. Pearce*, 14 Fla. 153 (1872).

In short, the caselaw overwhelmingly confirms that the *quo* in a bribery case must involve directing a particular resolution of a specific governmental decision. Never before has an official been convicted for arranging meetings, attending events, or asking questions without that additional critical step.

2. There appears to be only a single pre-*McNally* case wherein prosecutors sought to charge an official with honest-services fraud and Hobbs Act extortion even though the official never took, or urged others to take, governmental action for the bribe-payor: *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978). Tellingly, the court *rejected* that effort.

Rabbitt involved Missouri's House Speaker, who "offered, for a fee," to "introduce" a firm to high-ranking officials who "might be able to secure [state] architectural contracts for it." *Id.* at 1020. The court held that was not criminal. Rabbitt had arranged introductions, but the "officials who awarded architectural contracts did so on merit," not because Rabbitt had used his "influence" to "control" their decisions. *Id.* at 1026. That is, the firm paid for "*access* on a friendly basis to state officials," who then made independent selections. *Id.* at 1027 (emphasis added). As the court later explained, it reversed the conviction because Rabbitt had "promised only to introduce the firm to influential persons," not "to use his official position to influence those persons" by pressuring them to award contracts. *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993).

Rabbitt thus reflects the fundamental distinction between corrupting governmental decisionmaking versus affording "access" without compromising the decisionmaker's independent judgment. 583 F.2d at 1027 *Rabbitt* is an important piece of the pre-*McNally* corpus that *Skilling* incorporated. Were there any doubt that this caselaw limits core bribery to exercises of sovereign power, *Rabbitt* dispels it.

3. The limitation of bribery to acts that seek to alter a specific governmental decision is also compelled by the basic purpose of bribery laws: to ensure that sovereign decisions are based on independent judgment, not corrupt self-interest.

Bribery has always meant receiving a "reward" to "*pervert* the judgment." 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785)

(emphasis added); *see also* 1 Noah Webster, *An American Dictionary of the English Language* (1828) ("[a] price, reward, gift or favor" to "pervert the judgment, or corrupt the conduct"). Common-law courts emphasized that focus on the perversion of governmental decisionmaking. *E.g.*, *Commonwealth v. Callaghan*, 4 Va. 460, 463 (1825) (officials were "required" to vote "only" on "merit and qualifications" but instead "wickedly and corruptly violated their duty ... by voting under the influence of a corrupt bargain"). And the federal courts that developed the honest-services theory latched onto that rationale to explain why bribery constitutes "fraud." The "fraud involved in the bribery of a public official," one court reasoned, "lies in the fact that the public official is not exercising his independent judgment in passing on official matters." *Mandel*, 591 F.2d at 1362.

That understanding explains both why bribery is focused on abusing sovereign authority and why it is *not* implicated by merely providing access. When an official makes a governmental decision based on receipt of a personal benefit, that corrupts the decision. The same is true when an official allows a benefit to control his official advocacy regarding another official's governmental decision. *E.g.*, *United States v. Birdsall*, 233 U.S. 223, 229-30 (1914) (recommending clemency). Yet when an official merely gains benefactors "a friendly ear," *Rabbitt*, 583 F.2d at 1028—*i.e.*, provides *access* to a decisionmaker—but does not attempt to pervert the decisionmaker's independent judgment, that does not defraud the public of "honest services" in government administration. It is therefore not bribery—and certainly not "core" bribery.

B. The Bribery Statute Governing Federal Officials Also Supports This Conclusion.

Skilling also held that the scope of "core" bribery is informed by the prohibition against bribing federal officials. 561 U.S. at 409, 412. That statute confirms what history and the pre-*McNally* precedent establish: Bribery requires making or pressuring others to make decisions on the sovereign's behalf. Without agreement to direct a specific government decision, there is no bribery. That is why attending or arranging a meeting—even if that meeting *relates to* potential governmental action—is not enough.

1. Statutory text.

Title 18 U.S.C. § 201(b) prohibits federal officials from being improperly "influenced in the performance of any official act," defined as:

> [A]ny decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3), (b)(2)(A).

This language does not encompass everything officials do—or everything they do in their official capacities. It covers only exercises of governmental power on the sovereign's behalf, or attempts to induce such exercises. The statute distinguishes, in other words, between *discussing* a contract and *awarding* one. Its text makes this clear in three ways.

First, the statute does not encompass every "decision or action" that "relates to" a matter. It is

limited to a "decision on" or "action on" a matter. A "decision" is a "determination after consideration of the facts and the law." *Black's Law Dictionary* 467 (9th ed. 2009). That term contemplates officials *resolving* governmental matters, *i.e.*, making actual decisions on the sovereign's behalf. Likewise, taking "action on" a matter means directing its *disposition*. Neither term includes arranging a meeting to discuss a matter or asking questions about it. In those examples, the official has taken prefatory steps that could *inform* an *eventual* decision or action "on" the matter. That is not *itself* a "decision" or "action."

The Government has argued that "action on" a matter encompasses any action relating to it, however informal, result-neutral, or preliminary. But that is not how Congress uses that phrase. For example, the statute governing the Secretary of Health and Human Services' authority to authorize export of drugs to foreign countries requires the Secretary to "take action on a request for export of a drug under this paragraph within 60 days of receiving such request." 21 U.S.C. § 382(b)(3). The Secretary could not satisfy that requirement by having a meeting to discuss a request, doing nothing further, and claiming the meeting constituted "action on" that request. Same for 18 U.S.C. § 201(a)(3): "action on" a matter means directing its resolution.

Second, § 201 makes clear that the relevant "question" or "matter" must be a decision *the sovereign* makes; it does not encompass every decision *officials* make. All six of the statutory objects of the "decision or action"—"question, matter, cause, suit, proceeding or controversy," § 201(a)(3)—connote formal proceedings the sovereign resolves.

"[W]ords grouped in a list should be given related meaning," *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985), and, as the D.C. Circuit has explained, that "six-term series refers to a class of questions or matters whose answer or disposition is determined by the government." *United States v. Valdes*, 475 F.3d 1319, 1324 (D.C. Cir. 2007) (en banc).

Thus, a public official takes "official action" under § 201 by acting "on" an identifiable policy decision "that the government actually makes," such as: "What firm should supply submarines for the Navy?" 475 F.3d at 1324. The act must bear a specific and direct nexus to sovereign power. By contrast, decisions on what meetings to arrange or events to attend implicate no sovereign power; they are issues the government *qua* government "does not normally resolve." *Id.* They are not "official acts" under § 201.

Third, the issue must be one "which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity." § 201(a)(3). That further links the six-word series to actual sovereign power. Questions that are "not subject to resolution by the government are not ordinarily the kind that people would describe as 'pending' or capable of being 'by law ... brought' before a public official, especially if the law imposes no mandate on the official (or perhaps any official) to answer." *Valdes*, 475 F.3d at 1324.

Again, the bribery statute reaches only those questions that the government *qua* government resolves. Questions about who should speak with whom about what are not questions the sovereign resolves. They thus fall outside the statute.

In sum, § 201 limits federal bribery to the acceptance of money or gifts in exchange for agreeing to obtain a particular resolution of a specific governmental decision. That reading solves an otherwise-substantial "overbreadth problem." *Valdes*, 475 F.3d at 1329. If, as the Government says, "on" means "relating to" and "matter" extends beyond actual governmental decisions, then every act officials take—from attending events to making speeches—would qualify. If that were what Congress intended, its "insistence upon an 'official act,' carefully defined," *Sun-Diamond*, 526 U.S. at 406, would make no sense.

2. History.

The history of the federal bribery prohibition confirms that "official acts" are acts that exercise genuine governmental power. This is clear from the specific acts its precursor statutes criminalized; from the origin of the modern "decision or action" language; and from the legislative history of the modern definition.

First, § 201 has precursors dating to the founding. Those prohibitions identified specific acts certain officials could not perform in exchange for benefits. All were concrete exercises of governmental power. For example:

- for "any judge," deciding pending cases in a certain way, *see* Crimes Act of 1790, ch. 9, § 21, 1 Stat. 112, 117 ("obtain or procure [an] opinion, judgment or decree");
- for "officer[s] of the customs," failing to collect import duties, *see* Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46 ("connive at a false entry of

any ship or vessel, or of any goods, wares or merchandise"); or

- for "any [tax] collector or his deputy," failing to collect taxes, *see* Act of Mar. 3, 1815, ch. 100, § 17, 3 Stat. 239, 243 ("connive at any false entry, application, report, account, or statement").

Eventually, Congress supplemented these targeted prohibitions with a general statute similar to § 201. That 1853 enactment prohibited giving a benefit to a Member of Congress or federal officer "to influence his *vote or decision* on any question, matter, cause, or proceeding" pending or that may become pending. Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 170, 171 (emphasis added). That provision was designed to synthesize the individually identified "official acts" into a general definition that could apply across different offices. But that synthesis did not alter the fundamental *types* of actions that counted. Rather, the "vote[s] or decision[s]" this statute reached were the same concrete exertions of sovereign power its precursors encompassed.

Second, Congress later enacted a general bribery law that excluded Members of Congress. Act of July 13, 1866, ch. 184, § 62, 14 Stat. 98, 168-69. To reflect the omission of legislators, Congress altered its articulation of official acts—replacing "vote or decision" with "decision or action." 14 Stat. at 168. *Compare* Act of June 22, 1874, ch. 6, § 5500, 1 Rev. Stat. 1069, 1072, *with id.* § 5501, 1 Rev. Stat. at 1072. There is no indication this change was meant to dramatically expand bribery by striking its fundamental restriction to exercising sovereign

power. Congress does not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001), and switching "vote" to "action" would be an extraordinarily subtle way to suddenly sweep all meetings, questions, and events into the realm of bribery. The far better inference is that Congress used "decision or action" to capture the same type of conduct as its 1853 enactment—*i.e.*, exercises of sovereign power.

Third, in 1962 Congress enacted the current definition of "official act[ion]" in 18 U.S.C. § 201(a)(3), as part of consolidating various bribery, gratuity, and conflict-of-interest provisions. *See* Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119. Legislative history confirms that Congress intended to *retain* the longstanding limitation of bribery to exercises of sovereign authority. As the House Report explained, "[t]he definition of 'official act' is ... meant to include any activity that a public official undertakes *for the Government*." H.R. Rep. No. 87-748, at 18 (1961) (emphasis added). That report thus reiterated what has been clear since the founding: The only acts federal bribery law reaches are those that officials undertake "for the Government"—*i.e.*, on the sovereign's behalf.

3. Precedent.

Beyond text and history. this Court's most recent decision interpreting § 201(a)(3) unanimously rejected the Government's every-act-counts construction, recognizing that it would lead to "absurdities." *Sun-Diamond*, 526 U.S. at 408.

Sun-Diamond gave three examples of exchanges that "assuredly" involve "'official acts' in some sense,"

but not "within the meaning of the statute.'" *Id.* at 407 They were:

- "the replica jerseys given by championship sports teams each year during ceremonial White House visits," *id.* at 406-07;
- "a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school," *id.* at 407; and
- "a group of farmers ... providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy," *id.*

Even if those gifts were given in exchange "for" the acts of "receiving the sports teams at the White House, visiting the high school, and speaking to the farmers," they are not criminal. *Id.* They are taken in an *official capacity*, but implicate no *official power*. Textually, they involve no "decision" or "action" "on" any "question, matter, cause, suit, proceeding or controversy" before the official.

Sun-Diamond's examples only make sense if "official acts" are limited to those that exercise sovereign power. Officials do not exercise such power when they host an event, visit a school, or make a speech. They likewise do not exercise sovereign power when they decide "who to invite to lunch, whether to attend an event, or whether to attend a meeting or respond to a phone call." Pet.App.146a. But a broader construction of § 201(a)(3) collides with those illustrations: "[S]peaking to [] farmers" is a customary practice of the Secretary of Agriculture,

and "USDA policy" is a top priority. 526 U.S. at 407. If any customary practice related to government policy constitutes official action, then the Secretary's acceptance of lunch in conjunction with that speech would violate the gratuity statute. And if a jury finds a *quid pro quo*, that would be bribery.

The Fourth Circuit dismissed *Sun-Diamond*'s examples as "dicta," claiming the acts this Court described are "strictly ceremonial or educational" and thus "rarely" cross the criminal line. Pet.App.54a-55a. But that distinction does not make sense. An Agriculture Secretary "*always* has before him or in prospect matters that affect farmers." *Sun-Diamond*, 526 U.S. at 407. Thus, on the panel's reasoning, if instead of speaking to farmers, the Secretary participated in a routine roundtable to discuss their views, then a free lunch would be criminal. It would be in conjunction with action "on" the policies discussed because that discussion could "have the purpose or effect of exerting some influence on those policies." Pet.App.54a. Or if a mayor visited a school and asked students questions about increased school funding, then a free cap *would* be criminal—given for his action "on" school funding. Those consequences are no less "absur[d]" than the examples *Sun-Diamond* decried.

Sun-Diamond thus proves the point: The definition of "official act" must be tethered to sovereign power. It covers efforts to direct particular resolutions of specific governmental decisions—not everything officials customarily do that broadly relates to governmental issues.

C. Any Broader Construction Would Have Disastrous Consequences.

The consequences of the Government's construction confirm why it cannot be the law. Extending bribery beyond efforts to direct a particular resolution of a specific governmental decision would upend the political process, vesting federal prosecutors with extraordinary supervisory power over every level of government. If "official action" includes anything that could "have the purpose or effect of exerting some influence" on any imaginable sovereign decision (Pet.App.54a), then every official and campaign donor risks indictment whenever heightened access is provided in close temporal proximity to contributions. That happens literally every day at political fundraisers nationwide. As one businessman seeking public office recently explained: "I sign my checks to buy access." Bill Turque, *David Trone Has Donated More than $150,000 to Republicans, Database Shows*, WASH. POST, Jan. 28, 2016.

Under the Government's rule, answering a donor's call to discuss an official policy could "influence" that policy and is thus official action—just as much as appropriating $1 million to fund it. An official's referral of a donor to an agency with jurisdiction over his concern is official action that could "influence" the agency—just as much as a Member of Congress calling the agency's head and demanding that it award a contract. A legislator's participation in a roundtable on pending legislation is official action that could "influence" that legislation—just as much as committing to vote for it. Even inviting donors to the White House Christmas Party

is official action, because, as the prosecutors told the jury, such an invitation confers a "halo effect" and "credibility" on the invitee. Pet.App.261a.

If that is the law, prosecutors have every reason to investigate whether such call, referral, roundtable, or party invitation involved someone who had given gifts, provided travel, or made contributions. If so, prosecutors could (as here) ask a jury to find a wink-and-nod *quid pro quo*—based solely on timing—and convict. And every official who poses for photos in exchange for campaign donations could be convicted solely on the basis of invitations to fundraisers, since such invitations *routinely* propose an explicit *quid pro quo* trading campaign contributions for "access" to officials and photos that confer "credibility" on donors. *See, e.g.*, *Dine with Obama in Miami for $100k*, MIAMI HERALD, Sept. 30, 2009 ("$15,200 donation" for "a photo with the president").

Far from hypothetical, these exchanges are *routine*. This Court's decision in *McConnell v. FEC* described "White House coffees that rewarded major donors with access to President Clinton," "courtesies extended" to an individual whose donations were "motivated by his interest in gaining the Federal Government's support for an oil-line project," and donor programs that "promised 'special access to high-ranking ... elected officials, including governors, senators, and representatives.'" 540 U.S. 93, 130 (2003). "[N]ational party committees actually furnish[ed] their own menus of opportunities for access ..., with increased prices reflecting an increased level of access" to legislators. *Id.* at 151. *McConnell* distinguished such open "peddling [of] access" from the unlawful sale of "actual influence."

Id. at 150. Yet on the Government's view, there was no need for campaign-finance reform to address "access": All of those officials, from the President down, *could have been convicted of bribery*.

In one notable example, the PAC created by Governor McDonnell's successor offered "events that donors may participate in for donations ranging from $10,000 to $100,000," including "intimate sit-down meetings with the governor and 'policy experts.'" Laura Vozzella, *In Va., $100,000 Will Get You a Sit-Down with 'Policy Experts,' Governor's New PAC Says*, WASH. POST, Mar. 18, 2014. During the President's reelection campaign, donors were openly rewarded with opportunities to speak to top officials about policies within their jurisdiction. Peter Nicholas, *Administration Officials Double as Obama Campaign Speakers*, L.A. TIMES, Nov. 16, 2011 (fundraisers where EPA Administrator answered questions about oil pipeline). And countless stories have been written about a current presidential candidate's provision of heightened access while Secretary of State to individuals who paid large speaking fees to her husband or made contributions to her family foundation. *See, e.g.*, Sarah Westwood, *Nine Times Clinton Foundation Donors Got Special Access at State*, WASH. EXAMINER, Jan. 14, 2016. To be clear, Governor McDonnell does not believe that any of these actions were criminal. But under the Government's theory and Fourth Circuit's holding, the only thing standing between these officials and an indictment is prosecutorial discretion.

The Government's rule empowers prosecutors to investigate and indict essentially any official they choose. That is a dangerous power, inconsistent with

our Nation's commitment to the rule of law. That is why every principle about *how* to interpret the vague federal corruption laws militates against this attempt to create a roving prosecutorial power to promulgate—through criminal charges threatening decades in prison—"standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360. This Court should decisively reject that attempt, drawing a clear line to prevent future episodes of prosecutorial exuberance from shattering families, destroying careers, and altering elections.

III. GOVERNOR MCDONNELL NEVER TOOK OR AGREED TO TAKE ANY OFFICIAL ACTION.

Under the correct rule, the convictions below cannot stand. The Government alleged five specific "official" acts in the indictment; the district court charged the jury on those five acts; and the lower courts upheld the convictions based on those acts. But those acts were nothing more than arranging one meeting, attending one event, asking one question, letting Williams attend one cocktail party, and suggesting one more meeting. Under the undisputed evidence at trial, none of the five acts were "official" ones because the Governor never asked any official to do anything other than exercise independent judgment. That proof is insufficient as a matter of law. This Court should thus reverse the decision below and dismiss the charges.

But at the least, the Court should order a new trial with jury instructions that properly define "official action." The instructions below failed in multiple respects to convey the boundaries of that crucial concept.

A. None of the Five Allegedly "Official" Acts Are Sufficient as a Matter of Law.

As the district court recognized, the validity of the verdict "hinges" on "five specific actions" that Williams supposedly bribed Governor McDonnell to take. Pet.App.84a, 87a; *see also* Pet.App.90a-91a ("[T]he jury permissibly reasoned that Williams' gifts were tied to the five identified 'official acts' and thus fulfilled the requisite quid pro quo agreement."). Review of those acts shows that none were "official" because none directed a particular resolution of a specific governmental decision. None were (in § 201's terms) actions "on" any governmental matter.

The Government sought to circumvent that deficiency below by arguing that "official action" includes action on any broad topic from "Virginia business development" to "whether to have or attend [a particular] meeting." I.JA.411. It pressed that theory in its closing, telling jurors to convict if they found that Governor McDonnell had taken "official acts on the issue of Virginia business development"—"a capital priority" of his administration. XI.JA.7438-39. But that theory is obviously deficient: Neither "Virginia business development" nor "whether to have a meeting" is a decision the government *qua* government makes. *See supra*, Part II.B.1.

Only after securing its convictions has the Government retreated. The Government *now* claims the only relevant "matters" were "whether state universities would study Anatabloc; whether the state Tobacco Commission would fund the studies; and whether the state health plan would cover Anatabloc." BIO.13. Unlike Virginia business

development, those are indeed governmental matters. But the evidence does not support this reinvention of the case. The uncontested evidence shows that Governor McDonnell never took action "on" these matters—which is, of course, why prosecutors did not press this theory below.

1. Meeting with Health Department Aide.

The first "official act" involved the only staffer who actually met with Williams during the alleged conspiracy. Governor McDonnell asked his Secretary of Health to have someone attend a meeting between Williams and Mrs. McDonnell. That meeting was not about anything specific Williams wanted. As the staffer testified, Williams said nothing she understood "to be an ask." V.JA.3075. And within two hours, the staffer sent Williams a polite "blow-off" email. V.JA.3058, 3068-69.

Nor did Governor McDonnell speak to the staffer, let alone direct her to make decisions in Williams' favor. As the staffer testified:

> Q[:] What did you understand the desires of the Governor and the First Lady to be specific to this issue?
>
> A[:] At the time of the note, nothing more than attending the meeting.

V.JA.3044.

> Q[:] When you wrote this email, what did you understand your job to be going forward ... ?
>
> A[:] Nothing at the time of the written email.

V.JA.3058.

> Q[:] So after this meeting ... you still had no idea what [Mrs. McDonnell's] desires, if any, were with respect to Mr. Williams and Star. Is that fair?
>
> A[:] Shy of attending the meeting, no.

V.JA.3080.

In short, as the staffer explained, the Governor never "interfere[d] with [the] decision-making process by [her or her] colleagues." V.JA.3071. Arranging a neutral meeting did not exercise sovereign power or pressure others to. It was thus not an "official act."

2. Mansion Event.

The second "official act" was Governor McDonnell's attending a private lunch at the Executive Mansion—funded by his PAC—at which Star gave $200,000 in grants to UVA and VCU to prepare research proposals. IV.JA.2283. But merely attending an event does not exercise sovereign power; it neither makes commitments on the government's behalf, nor pressures others to.

The Government has focused on Governor McDonnell's asking questions of the researchers in attendance. But those questions were neutral and general. As the Government's witness testified:

> Q[:] What do you recall [the governor] talking about?
>
> A[:] So I think the one question he asked us was, did we think that there was some scientific validity to the conversation and some of the pre-clinical studies that were discussed, or at least alluded to. He also, I think, asked us whether or not there was any reason to explore this further; would it help to have additional information. And also, he

> asked us about could this be something good for the Commonwealth, particularly as it relates to economy or job creation.

V.JA.3344.

> Q[:] And based on the tenor of the conversation, was it generally a positive conversation about Anatabloc or was it all negative about Anatabloc?
>
> A[:] ... I think the Governor's position was more of an interrogative type of a sort of questioning rather than "Isn't this great?" or "Isn't this awful?" if that's what you are asking me.

V.JA.3345-46. His questions "were appropriate for a Governor, and were thoughtful." V.JA.3360.

No witness testified that Governor McDonnell asked anyone to conduct studies or did anything to corrupt the researchers' independent judgment about what research to do. In fact, Star's president testified to the opposite. In response to Williams' comment that he hoped the Governor would support state-funded research by the independent Tobacco Commission, Governor McDonnell demurred, citing his "limited decision-making power" in that area. VI.JA.3927. That is politician-speak for "no."

3. Email to Chief Counsel.

The third "official act"—which the Government exalted as its "best evidence," XI.JA.7616—was an 11-word email Governor McDonnell sent his chief counsel: "'Pls see me about Anatabloc issues at VCU and UVA. Thx.'" *Supra* at 5. The counsel's response: "'Will do. We need to be careful with this issue.'" *Id.* Nothing else happened; neither the counsel nor the Governor recalled any follow-up. The email contains

no indication that the Governor wanted his counsel to do anything other than "see" him and provide advice. That vague inquiry did not exercise sovereign power or pressure the counsel to do so. It, too, is plainly insufficient.

The Government has invoked an email *Mrs.* McDonnell sent to the Governor's counsel prior to the above inquiry. In that email, Mrs. McDonnell claimed the Governor wanted to "know why nothing has developed" despite Star donating $200,000 in research grants to UVA and VCU, and asserted that the Governor "want[ed] to get this going." V.JA.3213-14. But the Government never included this email in its list of supposed official acts, presumably because an email from *Mrs.* McDonnell cannot be an official act by *Governor* McDonnell. And besides, the counsel—who was not sure "whether the Governor was actually involved with this," V.JA.3215—responded to the email by phoning Williams' lobbyist to "shut this request down"—conveying that the Governor would *not* get involved. V.JA.3216. The counsel further recalled that Governor McDonnell "never followed back up with me or never pushed back or never directed me to actually go forward and try to make something happen with the universities." V.JA.3219. In other words, Governor McDonnell left the issue entirely to the counsel's judgment.

4. Healthcare Leaders Reception.

The fourth "official act" was a "Healthcare Leaders Reception." Approximately 300 people were invited; around 150 attended. IV.JA.2697-2700, V.JA.3711-19, VI.JA.4477-81. No witness recalled Governor McDonnell mentioning Williams or Star

during the event. Nor has the Government identified any governmental "matter" that this event even remotely implicated. Williams and his colleagues were indeed invited. But if that were *itself* official action, every President who has sold inauguration tickets or invited donors to the White House Holiday Party is an unindicted felon.

The Government has focused on Governor McDonnell's introduction of Dr. Paul Ladenson, the Head of Endocrinology at Johns Hopkins and a paid consultant to Star. IV.JA.2336. But Governor McDonnell never mentioned Star; he simply and truthfully introduced Dr. Ladenson (among others) as a distinguished physician from out-of-state. V.JA.3716. Once again, there was no link to any governmental decision. Even the Fourth Circuit implicitly conceded this act's insufficiency by failing to address it in its opinion. *Supra* at 17

5. Suggested Meeting with Star.

The final "official act" was something Williams did not know about at the time—Governor McDonnell possibly suggesting that two subordinates meet with Star. *See supra* at 8. The subordinates disagreed on whether the Governor suggested a meeting, VI.JA.4219, 4230-31, but, at most, Governor McDonnell consumed an Anatabloc pill—something he did regularly—said it was "working well for him, and that he thought it would be good for ... state employees, and then ... asked [them] if [they] would meet with [Star]." VI.JA.4227 They never did, and it never came up again. VI.JA.4219-20, 4230-31.

Governor McDonnell did not ask his subordinates to make any sovereign decisions. The Government

has argued that Governor McDonnell's comments somehow directed them to include Anatabloc in the state health plan. But no one testified to that. And as one of the subordinates explained, Virginia does not "cover dietary supplements in the state health plan," VI.JA.4204, so the subordinates could not have acted on this inchoate hint, even if Governor McDonnell had issued it. Again, no official action.

* * *

In sum, Williams never received anything beyond a little time from a few officials. He received no studies, no state-funded research, no inclusion on any state health formularies—*none* of the things the Government now claims he sought over a two-year long "conspiracy" that, if real, was the least successful conspiracy in corruption history. That is because there was no "conspiracy" or corrupt bargain; there were just gifts and loans, all legal under Virginia law.

As for the "five identified 'official acts,'" Pet.App.90a-91a, all were the pedestrian stuff of elected office. They were actions Governor McDonnell reflexively took thousands of times for the dozens of donors and non-donors he encountered every day. These five acts are, indeed, indistinguishable from those *Sun-Diamond* listed to show the "absurdity" of the Government's position there. If the Secretary of Agriculture speaking to farmers about agricultural policy is not "official action," then Governor McDonnell speaking to researchers or allowing Williams to attend a reception are not either. The charges should be dismissed as a matter of law.

B. At a Minimum, the Jury Instructions Require Reversal.

From beginning to end, this case hinged on whether Governor McDonnell's conduct crossed the line separating lawful actions from unlawful "official" ones. As the district court recognized, "[t]his case hinges on the interpretation of an 'official act' and whether McDonnell's actions constitute such." Pet.App.84a. It was therefore crucial to carefully instruct the jury on what an "official act" is and is not. Yet instead, the court refused to convey any meaningful limits on "official act," giving an instruction that allowed the jury to convict the Governor for lawful conduct.

This Court has "consistently ... followed" the "rule" that general verdicts "must be set aside" when the jury's instructions encompassed lawful conduct and the reviewing court is "uncertain" whether the jury relied on lawful conduct "in reaching the verdict." *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *see also, e.g.*, *Chiarella v. United States*, 445 U.S. 222, 237 n.21 (1980) ("We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct."); *Yates v. United States*, 354 U.S. 298, 312 (1957) (citing decisions); *Stromberg v. California*, 283 U.S. 359, 368 (1931). That is exactly what happened here. The district court's "official act" instruction never informed the jury that "official" acts must exert government power or pressure others to. Instead, the instruction *omitted* that crucial concept, focusing the jury on a lengthy, erroneous explanation of what "official action" *includes*, while rejecting every defense-proposed explanation of what it *excludes*.

This enabled prosecutors to argue that altering governmental decisions was *irrelevant*—telling jurors they were duty-bound to convict Governor McDonnell if he took any "customary" acts broadly related to "Virginia business development" on Williams' behalf. And since "any one" of the five acts was "sufficient" to convict, Pet.App.268a, the jury could have relied on just one—such as inviting Williams to attend the Healthcare Leaders reception, which had no nexus to any government business—regardless of whether Governor McDonnell agreed to exercise governmental power, alter official policy, or do anything that deployed his official powers. That finding is wholly insufficient on even *the Government's* (current) rule. The erroneous instructions thus also require reversal.

1. In instructing the jury, the district court did nothing to delineate the limits of "official action." Instead, it quoted the statutory definition from § 201(a)(3) and then expanded it:

> Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official

> action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

Pet.App.275a.

This instruction does not link official action to governmental power *at all*—much less require finding that the official agreed to put his thumb on the scale of a specific governmental decision. Instead the instruction quotes a complex statutory definition, then expands it to categorically "include[]" (1) "acts that a public official customarily performs"; (2) acts over which the official lacks "actual or final authority," "so long as the alleged bribe-payor reasonably believes that the public official had influence, power or authority over a means to the end"; and (3) acts that are "one in a series of steps to exercise influence or achieve an end." The word "includes" is "a term of enlargement," *Samantar v. Yousuf*, 560 U.S. 305, 317 n.10 (2010), and the court's sweeping statement of what official action "includes" reached essentially everything officials do.

Each expansion was erroneous. *First*, whether actions are "customary" has nothing to do with whether they are "official." Yet the heavy emphasis on whether Governor McDonnell's actions were "settled practices" focused the jury on the irrelevant issue of whether governors "customarily" arrange meetings or make public appearances. *Of course* they do—just as they "customarily" pose for photos or call donors on their birthdays (as Governor McDonnell did for Williams' father, IV.JA.2769). That does not make such banalities "official acts" under federal law.

Second, there is no authority for the proposition that *non*-official acts *become* official if "the alleged bribe payor reasonably believes" the official holds "influence, power or authority over a means to the end sought." Williams' belief that the Governor was moving him toward whatever "end" he "sought" by lending his company an air of credibility—whether by inviting him to a reception or referring him to an aide—does not turn that reception or referral into an "official act." The unspoken hopes and dreams of a triply-immunized witness cannot convert routine courtesies into official acts.

Finally, the notion that "official action" includes any step "in furtherance of longer-term goals," or anything "in a series of steps to ... achieve an end," is absurd. Everything officials do—attending a party, touting a home-state business, writing a thank-you note—could be a "step" towards some "end." Not even the Government would argue (at least not to this Court) that such actions are all "official" ones. Yet the jurors hearing this instruction would think otherwise. This instruction enabled the Government to argue that anything giving Williams "credibility" or a "halo effect" was official action. Pet.App.261a. Everything from "photos" to "ribbon cuttings" qualified. Pet.App.264a.

2. The district court compounded this error by steadfastly refusing to tell the jury about *any* limitations on "official action"—including limits its own post-trial opinions relied on. For example, the district court eventually agreed that "mere '[i]ngratiation and access' may not alone create a quid pro quo agreement." Supp.App.86. Yet it rejected Governor McDonnell's proposed instruction that

"mere ingratiation and access are not corruption." I.JA.753. Similarly, the court eventually agreed that the Government needed to prove that Governor McDonnell "attempted to use his gubernatorial position to influence governmental decisions." Supp.App.89. Yet it rejected Governor McDonnell's proposal directing the jury to decide whether his actions were "intended to or did, in fact, influence a specific official decision the government actually makes." Pet.App.254a. Indeed, the district court rejected all of Governor McDonnell's attempts to impose any limits on its otherwise all-encompassing "official act" instruction. Pet.App.145a, 251a-254a.

In short, the instructions never even hinted at the most fundamental attribute of official action—that the act be "intended to ... influence a specific official decision the government actually makes." Pet.App.254a. That was grievous error.

3. It is impossible to overstate the centrality to the verdict of this error-laden, unlimited instruction. The most important issue at trial was whether Governor McDonnell had taken official action on Williams' behalf. That was the heart of Governor McDonnell's closing argument, XI.JA.7543-53, and both closing arguments from the prosecutors, XI.JA.7438 (five "official acts on the issue of Virginia business development"), XI.JA.7608-13 (discussing the five acts), 7613 ("All of those things were what [Williams] got.").

This Court has long required "clear and explicit instructions" on issues going "to the very heart of the charges." *Yates*, 354 U.S. at 327 And here, the "need for precise and understandable instructions on

this issue is further emphasized by the equivocal character of the evidence in this record." *Id.* Yet rather than carefully explain this critical line, the district court ignored it, opting instead to endorse the Government's theory that Governor McDonnell took official action whenever he took any "customary" act—no matter how meaningless—"on the issue of Virginia business development." XI.JA.7438.

That charge supplied "wholly inadequate guidance to the jury on this central point," *Yates*, 354 U.S. at 327, and enabled the prosecutors to argue that influencing governmental decisions was *irrelevant*. All that mattered, they told the jurors, was that Governor McDonnell acted "in his official capacity as Governor" "on the issue of Virginia business development." XI.JA.7438-39. Under the "instructions on the law," if Governor McDonnell said a "kind word about Virginia business," posed for "photos," "ma[de] comments at different ribbon cuttings," or did "exactly as he had done hundreds of times before ... in exchange for money, it's a crime." XI.JA.7439-40. This Court "cannot allow" Governor McDonnell's convictions to "stand" given the plainly incorrect "direction to the jury" on that "basic issue." *Yates*, 354 U.S. at 327

4. The Fourth Circuit held that none of this matters because the instruction "adequately delinated" the law by quoting § 201(a)(3)'s definition of "official act." Pet.App.49a. That is obviously incorrect; we do not give lay juries copies of the U.S. Code and leave them to figure it out. That is why this Court unanimously reversed in *Sun-Diamond*. The instructions there, like those here, quoted a complex statute and added an "expansive gloss." 526

U.S. at 403, 412-13. In this case, giving instructions that included a statutory definition alongside a series of free-lancing elaborations left the jury free to convict Governor McDonnell for legal conduct.

And that is precisely what happened. While the defense tried to focus the jury on the statutory definition, XI.JA.7543-50, the Government exploited the rest of the instruction to brush it aside. Prosecutors opened their rebuttal by reminding the jury that, "as the judge is going to instruct you," the *quo* for bribery "includes" actions that an official "customarily performs." XI.JA.7608. "They keep on talking about no one was pressured," prosecutors chortled; but "[w]hen you get these jury instructions, ladies and gentlemen, you look for the word pressure. It doesn't appear anywhere." Pet.App.268a. "Whatever it was, it's all official action," they advised the jury, Pet.App.263a—which is, no doubt, why the jurors *thought* the only question they had to decide was, as one juror put it: "Would the McDonnells have received these gifts if Bob McDonnell weren't governor?" Josh Gerstein, *Why Edwards Won, McDonnell Lost*, POLITICO, Sept. 5, 2014.

That is not the law. The district court's refusal to so inform the jury requires a new trial at the least.

IV THE HONEST-SERVICES STATUTE AND HOBBS ACT ARE UNCONSTITUTIONALLY VAGUE.

The above represents the only plausible construction of these statutes. But this case also presents a more basic question—whether the Constitution permits lawmaking-by-trial wherein prosecutors mint new criminal prohibitions through novel indictments. It does not.

A. The Honest-Services Statute Is Unconstitutionally Vague.

In *Skilling*, this Court did everything it could to preserve the will of Congress without striking down the law. It took the prohibition against deprivation of "the intangible right of honest services"—a phrase that alone provides no meaningful guidance to the prosecutors who enforce it, the judges who interpret it, or the citizens who go to jail when they transgress it—and confined it to "the bribe-and-kickback core of the pre-*McNally* case law." 561 U.S. at 409. But rather than celebrate this Court's preservation of that powerful statute, the Government responded by trying to evade that holding—converting virtually *everything* officials do into *quid pro quo* bribery. If every benefit can be *quid* and juries can infer *pro* from circumstance, then expanding *quo* to encompass everything officials customarily do revives the same boundless authority to prosecute ethically questionable conduct that *Skilling* rejected.

The Government's ability and willingness to obliterate *Skilling*'s careful limits illustrates the need for Congress—rather than the courts—to recalibrate this "potent federal prosecutorial tool." *Sorich v. United States*, 555 U.S. 1204, 1206 (2009) (Scalia, J., dissenting from denial of certiorari). This Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Nor should it continue to judicially amend a vague one in the face of prosecutorial abuse.

This Court has long recognized that the Constitution forbids Congress from casting a "net

large enough to catch all possible offenders," while leaving "it to the courts to step inside and say who could be rightfully detained." *United States v. Reese*, 92 U.S. 214, 221 (1876). Absent clear legislative direction, there is a very real risk that "policemen, prosecutors, and juries" will simply "pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). Nowhere is that risk more acute than in the public corruption arena—involving an unpopular class (politicians) who are often prosecuted in a politically charged environment amidst a media frenzy. And for the same reason, it is imperative for corruption laws to provide sufficient notice about what conduct they prohibit. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Public officials—faced with endless twelve-hour days of raising money, meeting constituents, making countless decisions (large and small), and generally trying to govern—need clear rules to follow.

But the honest-services statute provides the *opposite*—giving virtually no practical guidance, notwithstanding this Court's efforts. For citizens who seek to support their favorite candidates and petition their representatives, a quandary exists. Should they give contributions to the officials whom they petition? Or would the provision of financial support open the door to criminal prosecution? As this case shows, even after *Skilling* the answers to such questions are unclear. That is constitutionally unacceptable in any context, but it is particularly impermissible in this one.

The time has therefore come to return the honest-services statute to Congress for revision. As this Court recently recognized about a similarly

notorious provision, "[i]nvoking so shapeless a provision to condemn someone to prison ... does not comport with the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2560. So too here.

B. The Honest-Services Statute and Hobbs Act Are Unconstitutionally Vague As Applied.

At the very least, the honest-services statute and Hobbs Act are "impermissibly vague as applied to petitioner because of [their] failure to give him fair notice" that his conduct could be criminal. *Rabe v. Washington*, 405 U.S. 313, 315-16 (1972). Neither of these provisions put Governor McDonnell on notice that accepting legal-under-state-law benefits from someone to whom he extended a few routine courtesies was criminal. Nor is the Governor aware of any decision from any court at any point in history holding that these statutes reach conduct like his. He thus had no notice—let alone "fair notice"—that he was committing multiple federal felonies. The Constitution forbids after-the-fact criminalization of conduct on the basis of provisions that mean whatever prosecutors say they mean. That prohibition applies directly here.

Public officials should not need to consult Nostradamus to know what federal law prohibits, but that is what the Government's position would require. As a bipartisan group of former Virginia Attorneys General has been explaining since the district court—and as the absence of any comparable case confirms—the Government's theory "is completely alien to any legal advice that any of us would have given to any Governor of Virginia."

Fmr.VA.AGs.Am.Cert.2. For Governor McDonnell to have anticipated the theory that now threatens his liberty, he would have had to (1) divine that the federal corruption statutes contain a judicially engrafted "official act" element, (2) review another statute's definition of that phrase for federal officials, (3) realize that, despite countless canons requiring narrow interpretation, this statute has its broadest possible meaning, even though no court had ever hinted at it, and (4) figure out that he has federal criminal exposure, even though his conduct complies with the state laws that supply his primary ethical guideposts. The requirement of fair notice would be meaningless if criminal law could depend on such speculation.

Thousands of state and local officials endeavor to follow the web of federal, state, and local corruption laws, ethics rules, and gift regulations that govern their conduct, but they cannot be expected to follow rules that have never been announced. This Court is already struggling with the Hobbs Act's breadth—a breadth that approaches "the limit" of "logic" when applied to bribery *at all*, Oral Arg. Tr., *Ocasio v. United States*, No. 14-361, at 22:23 (U.S. Oct. 6, 2015) (Breyer, J.), let alone when applied to the new every-act-counts species of bribery the Government has engineered here. In the context of this case, these provisions simply "fail[] to give the ordinary citizen adequate notice of what is forbidden and what is permitted." *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (plurality). This Court should thus, at the least, hold that the honest-services statute and Hobbs Act are unconstitutionally vague as applied to Governor McDonnell's conduct.

CONCLUSION

The judgment below should be reversed and the criminal charges dismissed.

Respectfully submitted,

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FEBRUARY 29, 2015